APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-3019

PAMELA R. GOODWIN, Plaintiff-Appellant

v.

GENERAL MOTORS CORPORATION,
Defendant-Appellee

Appeal from the United States District Court
for the District of Kansas
No. 99-2241-CM — Carlos Murguia, *District Judge*

Decided January 3, 2002

EBEL and PORFILIO, *Circuit Judges*

SHADUR, *District Judge*[1]

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[1] The Honorable Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by

SHADUR, *District Judge*. Pamela Goodwin ("Goodwin") has sued her employer General Motors Corporation ("General Motors"), charging it with racial discrimination actionable under Title VII of the Civil Rights Act of 1964 ("Title VII," 42 U.S.C. §§ 2000e to 2000e-17). Goodwin, who is African American, alleges that General Motors has discriminated against her over the years by paying her a significantly lower salary than similarly-situated white employees.

After reviewing the parties' submissions on General Motors' motion for summary judgment under Fed.R.Civ.P. ("Rule") 56, the district court granted that motion on the grounds (1) that the majority of Goodwin's claims for pay discrimination were time-barred because her pay rates had been established more than 300 days before she filed her charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") and (2) that Goodwin had failed to present a prima facie case for discrimination related to the single claim that was not time-barred.[2]

STANDARD OF REVIEW

We review the grant of summary judgment de novo, applying the same standard as did the district court (*Brown*

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designation.

[2] Goodwin's initial complaint had also asserted claims under 42 U.S.C. § 1981. Because she failed to address those claims in response to General Motors' Rule 56 motion, the district court deemed them abandoned in the course of granting summary judgment to General Motors. That abandonment ruling has not been appealed.

v. Gray, 227 F.3d 1278, 1285 (10th Circ. 2000)). Under Rule 56(C) summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Familiar Rule 56 principles impose on General Motors as movant the initial burden of establishing the lack of a genuine issue of material fact (*Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). On appellate review we, like the district court, are required to draw all reasonable inferences in the light most favorable to nonmovant Goodwin (*Brown*, 227 F.3d at 1285).

FACTS

Goodwin began working for General Motors in 1976 in a pre-foreman training program at its Leeds plant in Kansas City, Missouri. During the next decade she held a number of different positions there, including supervisor over janitorial services, supervisor over sanitation and senior clerk. Goodwin was also laid off several times as a result of reductions in force. Following each layoff she was recalled, although she experienced some salary reductions as a result of the layoff periods.

In August 1987 General Motors closed the Leeds plant and again placed Goodwin on layoff status. In October 1987 General Motors rehired her to work as a temporary security guard at its Fairfax plant in Kansas City, Kansas. Several months later Goodwin accepted a position as clerk in the labor relations department of that plant. When she

had interviewed for that position she was informed that it was a permanent fifth-level position,[3] but upon being hired she was placed in a temporary fourth-level position. Her salary was even lower than what she had received as a fourth-level clerk at the Leeds plant, and she was told that this was because Fairfax plant workers were paid less than those at the Leeds plant. After Goodwin had applied to transfer to another General Motors plant, her position was made permanent, and her salary was later adjusted to reflect a fifth-level rate of pay. In late 1991 Goodwin was promoted to the sixth-level position of labor relations representative ("representative"), a position that she continues to hold today.[4]

While employed by General Motors, Goodwin obtained a bachelor's degree in 1986 and a master's degree in personnel and labor relations in 1989. At the time of Goodwin's promotion to representative, all three of the other representatives were white, and only one had a master's degree. Each of the four representatives had been a salaried employee of General Motors since the 1970s and had held a variety of positions, including other supervisory positions, before becoming a representative. Goodwin's supervisor Charles Limon testified that all four of the

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[3] General Motors uses job levels to designate the salary ranges available to employees in particular positions.

[4] For a period of time from April 1992 until December 1993, Goodwin -- along with another one of the representatives - - was returned to a fifth-level position, without any decrease in salary, due to a reduction in force at the Fairfax plant.

representatives had different strengths and weaknesses and that none of them stood "head and shoulders" above the rest.

When she was promoted to representative, Goodwin's salary was set at more than $300 per month lower than the lowest paid of the other representatives and more than $500 less than the highest paid. Over the years that salary disparity grew larger (principally due to straight percentage increases), until in 1997 Goodwin was being paid $547 less per month than the next lowest paid representative. During the same period of time the disparity among the rates of pay of the other three representatives shrank from over $200 per month to only $82 per month.

Pay ranges for salaried employees in General Motors plants are established by company headquarters in Detroit. Aside from those market ranges, there are no set rates for employees entering specific positions. Salaries are not dictated by an employee's seniority with the company or in a particular position, and subjective factors can come into play as managers and personnel officers determine the levels of compensation for salaried employees.

General Motors also maintains a confidentiality policy regarding salaried employees' earnings, so that Goodwin did not know about--and had no way of discovering--the salary disparity between herself and the other representatives. In about April 1996 Goodwin did express concerns about her compensation level to the personnel director after hearing a rumor that a white clerk in a fifth-level position was earning more than she was. Goodwin was assured that her salary was higher than the clerk's.

When she asked if her raises could be increased to bring her salary closer to what she believed to be the market range for her position, she was told that no funds were available for such an adjustment.

In March 1998 a printout listing the 1997 salaries of each of the four representatives somehow appeared on Goodwin's desk and on the desks of some co-workers.[5] Goodwin immediately sought an explanation from management as to the disparity the printout revealed. In June 1998 General Motors offered Goodwin an annual raise of 5% -- but because she refused to sign a contemporaneous document acknowledging that she had received all of the compensation due her, she never received that increase. Two months later Goodwin was offered an additional raise that would have kept her salary $259 less than the next than the next lowest paid representative, and she declined that as well. Nor did Goodwin receive a 1999 annual raise, also due to her continuing refusal to sign the acknowledgment.

On September 22, 1998 Goodwin filed a charge of employment discrimination with EEOC. After she received a right to sue letter, she timely filed suit in the District of Kansas. Upon completion of discovery General Motors filed its motion for summary judgment. As stated earlier, this is the appeal from the granting of that motion and the consequent dismissal of the case.

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[5] Neither party has provided an explanation of how that printout came to be placed on Goodwin's desk or by whom, but there is no dispute as to the accuracy of the information it contained.

STATUTE OF LIMITATIONS

Under Title VII a plaintiff must file an administrative charge with EEOC within 300 days after the alleged act of discrimination (*Martin v. Nannie & the Newborns, Inc.*, 3 F.3d 1410, 1414 (10th Cir. 1993)). Here the district court ruled that with the exception of the raise Goodwin was offered in 1998, any claims related to her pay rate were barred as having occurred more than 300 days before she filed her EEOC charge. In so ruling the district court framed Goodwin's pay discrimination claim as a continuing effect of prior discrimination. That analysis was clearly in error.

Continuing effects of prior discrimination are generally not actionable under VII once the 300 day filing period has passed following the underlying discriminatory acts. *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558, 97 S.Ct. 1885, 52 L.3d.2d 571 (1977) held that an otherwise neutral system that merely perpetuates the effects of previous discrimination is not itself actionable under Title VII. In effect *Evans* precludes any plaintiff from recovering for any lingering effects of discrimination once the Title VII filing period has elapsed after the underlying discriminatory acts (see also *Delaware State Coll. v. Ricks*, 449 U.S. 250, 258, 101 S. Ct. 498, 66 L.Ed.2d 431 (1980); *Lorance v. AT & T Techs., Inc.*, 490 U.S. 900, 908, 109 S. Ct. 2261, 104 L.Ed.2d 961 (1989)).

But *Bazemore v. Friday*, 478 U.S. 385, 395, 106 S.Ct. 3000, 92 L.3d.2d 315 (1986) has taught a crucial distinction with respect to discriminatory disparities in pay, establishing that a discriminatory salary is not merely a

lingering effect of past discrimination -- instead it is itself a continually recurring violation.[6] *Bazemore* addressed the question whether discriminatory pay rates that had been set before Title VII became applicable to state and local governments were actionable or nonactionable under Title VII as then amended to expand its coverage (*id.*). In answering that question in the affirmative, *Bazemore* articulated what remains the basic rule as to pay discrimination claims (*id.*):

> Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII.

Under *Bazemore*, then, pay discrimination must be viewed as a continually recurring series of violations, each of which is separately actionable under Title VII.

While the circuit has had no previous occasion to consider and apply that rule, other circuits have uniformly recognized that under *Bazemore* "a claim of discriminatory

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[6] *Bazemore* begins with a brief two-page per curiam opinion (*id.* at 386-88, 106 S.Ct. 3000). What then follows is an extended concurring-in- part opinion authored by Justice Brennan and joined by *all* of the other Justices (*id.* at 388-407, 106 S.Ct. 3000). Two other opinions conclude the array: a separate concurrence by Justice White, written for himself and four other Justices (*id.* at 407-09, 106 S.Ct. 3000), and a dissenting-in-part opinion by Justice Brennan, written for himself and three other Justices (*id.* at 409-20, 106 S.Ct. 3000). Because what is treated in this opinion is drawn entirely from the first-mentioned Brennan opinion, it represents a unanimous decision of the Supreme Court.

pay is fundamentally unlike other claims of ongoing discriminatory treatment because it involves a series of discrete, individual wrongs rather than a single and indivisible course of wrongful action" (*Pollis v. New School for Soc. Research*, 132 F.3d 115, 119 (2d Cir. 1997); accord, *Cardenas v. Massey*, 269 F.3d 251, 257 (3d Cir. 2001); *Wagner v. NutraSweet Co.*, 95 F.3d 527, 534 (7th Cir. 1996); *Ashley v. Boyle's Famous Corned Beef Co.*, 66 F.3d 164, 168 (8th Cir. 1995) (en banc); *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336, 347 (4th Cir. 1994); *Calloway v. Partners Nat'l Health Plans*, 986 F.2d 446, 448-49 (11th Cir. 1993)). Today we join those circuits and the Supreme Court in recognizing that each rase-based discriminatory salary payment constitutes a fresh violation of Title VII.

General Motors argues that *Bazemore* is inapplicable here, but that argument is unpersuasive. Simply put, none of the cases cited by General Motors in any way supports the premise that *Bazemore* is irrelevant to Goodwin's pay discrimination claim.

Thus General Motors points to *Carter v. West Publ'g Co.*, 225 F.3d 1258 (11th Cir. 2000), but *Carter* did not involve a claim of pay discrimination. Instead it dealt with the lingering effects -- the nonreceipt of dividends -- of an employer's time-barred discriminatory act of failing to offer stock options to female employees (*id.* at 1265). As such, that claim fell under the *Evans* line of cases instead of *Bazemore*.

General Motors also urges us to adopt the different approach taken in *Dasgupta v. University of Wisconsin*, 121

F.3d 1138 (7th Cir. 1997). *Dasgupta* dealt with a complaint of national origin discrimination in which the plaintiff alleged several manifestations of discrimination: differences in pay and promotion as well as the employer's failure to protect him from harassment by other employees (*id.* at 1139). Each instance of harassment and failure to promote occurred years before plaintiff filed his claim, but he argued that those actions resulted in a continuing violation via a lower salary (*id.* at 1139-40).

In finding the plaintiff's claim barred by the filing period requirement, the Seventh Circuit analyzed the claim under the lingering effects framework and held that the plaintiff's lower salary did not itself create an independent cause of action (*id.* at 1140). Describing the line between *Dasgupta* and *Bazemore* as a "fine one, but reasonably distinct," the court said that unlike *Bazemore* "[t]his is not a case ... where the illegal act is repeated during the limitations period" (*id.*). In drawing that line the court did not advert to the unambiguous *Bazemore* holding that we have quoted, nor did it explain how--particularly in light of that holding -- Dasgupta's claim of discriminatory salary failed to constitute a recurring violation during the limitations period.

Finally, General Motors cites to the district court opinion in *Amro v. Boeing Co*, 65 F. Supp.2d 1170 (D. Kan. 1999), a decision that we affirmed at 232 F.3d 790 (10th Cir. 2000). While the district court there found *Dasgupta* persuasive (65 F. Supp.2d at 1184-85), it did so in a context in which the plaintiff attempted to avoid the preclusive effect of the holding in an earlier suit -- a ruling that his employer had not engaged in salary discrimination--

by arguing in plaintiff's second suit that his aggregate salary was discriminatory (*id.*). In affirming we made much the same point as the district court: Because it had previously been determined that the earlier salary decisions were not discriminatory, any ramifications that those decisions might have on the plaintiff's current salary were obviously not discriminatory either (232 F.3d at 798-99). That holding provides no support for General Motors' position here.

No other circuit has discerned the fine-line "distinction" perceived by the Seventh Circuit in *Dasgupta*, and we find any such approach unpersuasive here. Goodwin has shown that General Motors pays her less than her similarly-situated white co-workers. To further distinguish Goodwin's situation from that in *Dasgupta*, Goodwin had no way of knowing about that disparity (and hence about the assertedly race-based discrimination) until she received the salary information in 1998, at which time she promptly initiated this action.[7] Just as in *Bazemore*,

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[7] On this point the district court's analysis was particularly flawed. It found that Goodwin should have known of the need to file a complaint at the time she received each raise or promotion, for she knew (of course) what her actual salary was at those times. Just sentences later, though, the district court commented that notice of an adverse employment decision is required before the statute of limitations begins to run under Title VII. Here Goodwin indisputably had no notice that any of General Motors' salary decisions were adverse to her in terms of racial disparity until she received the salary printout in March 1998. It makes no sense to suggest that Goodwin should or even could have filed her complaint before she knew about any adverse decisions.

each paycheck that delivers less to Goodwin than to her co-workers constitutes grounds for a new claim under Title VII. We find that Goodwin's claim falls squarely within the pay discrimination framework articulated by *Bazemore*, and we therefore hold that her claim is not barred by the 300-day filing requirement in Title VII.

There is, however, a limitation on the relief that Goodwin may obtain should she succeed in proving her charge of discrimination at trial. Title VII permits the recovery of back pay for a period no longer than two years before the filing of the charge of discrimination. As the en banc Eighth Circuit explained in *Ashley*, 66 F.3d at 168:

> Relief back to the beginning of the limitations period strikes a reasonable balance between permitting redress of an ongoing wrong and imposing liability for conduct long past.

We agree with that analysis. Title VII's two-year limitation, which cuts off any claim for the period preceding September 22, 1996, applies to any damages that Goodwin may prove at trial.

EVIDENCE OF DISCRIMINATION

We now turn to Goodwin's substantive claim. At this summary judgment stage she may show[8] discrimination

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[8] Of course Goodwin need not "show" or "prove" or "establish" anything to defeat General Motors' summary judgment motion. Instead she must merely demonstrate the existence of a genuine issue of material (that is, outcome-determinative) fact. Although this opinion will nonetheless often employ one of the quoted terms because that terminology

either directly (through direct or circumstantial evidence or both) or via the indirect *McDonnell Douglas* burden-shifting method (*Elmore v. Capstan, Inc.*, 58 F.3d 525, 529 (10th Cir. 1995)). With Goodwin having proffered no direct evidence of discrimination, we must analyze her claims under the *McDonnell Douglas* ping-pong formulation. First Goodwin must establish a prima facie case of discrimination (*id.*). If she does so, General Motors must articulate a legitimate nondiscriminatory reason for its decision (*id.* at 530). If General Motors meets that burden (of production, not persuasion), Goodwin must prove that the decision was actually the result of intentional discrimination, either by producing evidence of discriminatory motive or intent or by showing that the articulated reason is pretextual (*id.*).

Goodwin may demonstrate a prima facie case of racial discrimination in a number of ways, including a showing that (1) she is a member of a racial minority, (2) her job performance was satisfactory, (3) she was adversely affected by General Motors' employment decisions and (4) similarly situated non-minority employees were treated differently from her (see the discussion in *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1195 & nn. 6-7 (10th Cir. 2000)). That is not an onerous burden (*Ortiz v. Norton*, 254 F.3d 889, 895 (10th Cir. 2001)). And here General Motors has disputed only the fourth element--that similarly situated non-minority employees were treated differently.

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is often used by the cited cases, we have consistently imposed that lesser burden on Goodwin in testing her position.

In analyzing that issue the district court limited its consideration to the raise that Goodwin received in 1998, reasoning that it was the only salary decision that fell within the period of the statute of limitations. Its limited consideration produced two findings: (1) that Goodwin was similarly situated to the other three representatives[9] and (2) that she was not treated differently because the *percentage* raise that she was offered was equal to or greater than the *percentage* increases given to her co-workers that year. Both by using a percentage approach rather than the absolute numbers involved[10] and by limiting its analysis to

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[9] General Motors has not challenged this finding on appeal, and it is well-supported by the evidence. All four representatives had the same supervisor, performed identical job duties and were subject to the same company standards and policies. In addition, each was a long-term General Motors employee who had held a variety of company positions, including prior supervisory jobs, before being promoted to the position of representative. And Goodwin was one of just two who had master's degrees.

[10] By definition the application of an identical percentage increase to already unequal amounts increases the dollar difference between them. Because the key showing of discrimination lies in the salary differential between Goodwin and the other representatives, a differential that was maintained--and indeed expanded--by General Motors' practice of granting equal or similar percentage raises to the four employees, such use of an identical percentage increase does not excuse or avoid the discrimination shown by the disparity-in-dollars end result.

that singe raise instead of considering Goodwin's full salary history, the district court erred.

While as noted earlier Goodwin may recover damages only for Title VII's two-year statutory period, that limitation on recovery does not at all preclude her from introducing the "quite probative" evidence of earlier acts of discrimination to support a claim of current discriminatory intent (*Bazemore*, 478 U.S. at 402 n. 13, 106 S.Ct. 3000; accord, *Pitre v. Western Elec. Co.*, 843 F.2d 1262, 1267 (10th Cir. 1988)). Goodwin may therefore adduce evidence of disparate salary payments throughout her tenure as a representative.

Goodwin's evidence that her starting salary as a representative was between $300 and $500 less than that of her co-workers and that the disparity actually increased as she remained in that position--while the disparity among the other representatives shrank--is certainly adequate to establish that she was treated differently from her similarly-situated non-minority co-workers. Hence Goodwin has demonstrated a prima facie case of discrimination.

Under the next *McDonnell Douglas* step, General Motors must articulate a legitimate nondiscriminatory reason for its salary decisions. General Motors has met that "exceedingly light" burden (*Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1363 (10th Cir. 1997)) by asserting that Goodwin's salary is simply the natural outcome of her unique employment path. In particular, General Motors points out that unlike the other representatives Goodwin began her career at Leeds instead of Fairfax and suffered salary and grade level demotions as a result of lay-offs.

General Motors has also argued that it simply could not afford to raise Goodwin's salary to pay her as much as the other representatives.

In response, Goodwin must demonstrate that those reasons are pretextual (*Randle v. City of Aurora*, 69 F.3d 441, 452 (10th Cir. 1995)). One way for her to do that is to provide evidence that General Motors' reasons are not worthy of belief (*id*; *Gossett v. Oklahoma ex rel. Bd. of Regents for Langston Univ.*, 245 F.3d 1172, 1177 (10th Cir. 2001)).

Goodwin has more than demonstrated a material factual issue on that score. General Motors' claim that her lower salary resulted in part from her initial employment at the Leeds plant flatly contradicts the explanation that it gave Goodwin when she was first hired at the Fairfax plant--that Leeds paid its employees more than Fairfax. Similarly, the evidence demonstrates that Goodwin's overall employment path with General Motors is not significantly different from that of the other representatives: All had lengthy careers with General Motors that included significant supervisory experience. When that is combined with Goodwin's education level, which was equal to or greater than that of her co-workers, it cannot be said as a matter of law that Goodwin's employment history justified the pay disparity, let alone its ever-increasing gap.

Finally, the suggestion that General Motors lacked the resources to pay Goodwin a higher salary may clearly be viewed as pretextual in light of the company's policy of setting salary ranges according to market rates, as well as its offer to increase her salary when she confronted them

with the evidence of the pay disparity. Goodwin has presented ample evidence under the *McDonnell Douglas* burden-shifting method to raise genuine issues of material fact as to General Motors' motives in setting, and keeping, her salary well below that of her similarly-situated non-minority co-workers.

CONCLUSION

In sum, we conclude that Goodwin has succeeded in demonstrating the existence of genuine issues of material fact on her claim of race-based pay discrimination and that the district court erred in granting General Motors judgment as a matter of law. We REVERSE the district court's dismissal of Goodwin's claim and we REMAND this case for trial.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

PAMELA R. GOODWIN,	)	
	)	
Plaintiff,	)	CIVIL ACTION
	)	
v.	)	No. 99-2241-CM
	)	
GENERAL MOTORS CORPORATION,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM AND ORDER

This matter is presently before the court on the defendant's, General Motors Corporation, motion for summary judgment (Doc. 28) and the plaintiff's, Pamela Goodwin, motion to supplement (Doc. 39) her response to defendant's summary judgment motion. In the interests of justice, the court grants the plaintiff's motion to supplement and considers the supplemental memorandum in deciding the defendant's motion for summary judgment. For the reasons set out herein the defendant's motion for summary judgment is granted.

I. MOTION TO SUPPLEMENT

The summary judgment motion at issue here has a tortuous history. Defendant filed the motion on June 30, 2000 and plaintiff did not respond within the time allowed by local rule. After asking the court to grant the summary judgment motion as unopposed, the defendant discovered that it had served the motion on plaintiff's attorney by first class mail to an incorrect address. The court held a telephone conference on September 6 and granted the plaintiff until October 10 to respond to the motion. Plaintiff filed her response at 11:44 p.m. on October 10. On October 20, before the defendant replied to plaintiff's response, plaintiff filed a motion to supplement along with a Supplemental Memorandum in Opposition to Defendant General Motors Corporation Motion for Summary Judgment. On October 23, defendant filed a reply memorandum in support of its summary judgment motion, but has responded neither to plaintiff's motion to supplement nor to plaintiff's supplemental memorandum.[1]

The court has discretion to permit supplemental briefing and, although it generally disfavors

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[1] In a footnote to its reply memorandum, the defendant states its opposition to plaintiff's motion to supplement and requests ten days to respond to the plaintiff's supplemental memorandum if the court allows the supplementation. (Def.'s Reply Mem., n.1). Making a request in a footnote in a brief is insufficient to seek affirmative action by the court. *Dewey v. Topeka*, No. 97-4037-SAC, 2000 WL 1542885, at *2 (D. Kan. Sep. 19, 2000) (citing Fed. R. Civ. P. 7 and D. Kan. Rule 7).

supplementation, it will occasionally consider it. *Cotracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 655, 659 (D. Kan. 1999); compare *Cotracom Commodity Trading Co. v. Seaboard Corp.*, 189 F.R.D. 456, 457 (D. Kan. 1999) (request for sanctions inappropriate in supplement to a motion filed months earlier). The court may grant an uncontested motion without further notice. D. Kan. Rule 7.4.

Plaintiff's memorandum, filed on October 10, did not include exhibits which were cited in the memorandum. Plaintiff's statement of uncontroverted facts in the October 10 memorandum did not cite with particularity to the record as required by D. Kan. Rule 56.1. Plaintiff's supplemental memorandum corrects those deficiencies. Plaintiff argues that the supplemental memorandum "does not materially alter Plaintiff's initial response to the summary judgment." (Pl.'s Mot. to Supplement at 1). Although the supplemental memorandum does not set out any new legal theories, the court notes that it provides twelve additional numbered paragraphs of allegedly uncontroverted facts and approximately four pages of additional argument. In the interests of justice, however, the court finds that it would unfairly prejudice the plaintiff if the court were to deny her request to supplement her response. Where the plaintiff has corrected procedural deficiencies before the defendant replied to the memorandum, the court should not use the rules of procedure to prevent a decision on the merits of the motion, since the defendant has not been prejudiced thereby. Therefore, the plaintiff's motion to supplement is granted and the court will consider the plaintiff's

supplemental response in opposition to defendant's motion for summary judgment.

II. SUMMARY JUDGMENT STANDARDS

Summary judgment is appropriate if the moving party demonstrates that there is "no genuine issue as to any material fact" and that it is "entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In applying this standard, the court views the evidence and all reasonable inferences therefrom in the light most favorable to the nonmoving party. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim." *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). An issue of fact is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way." *Id.* (citing *Anderson*, 477 U.S. at 248).

The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Id.* at 670-71. In attempting to meet that standard, a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party's claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party's claim. *Id.* at 671 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)).

Once the movant has met this initial burden, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256; *see also Adler*, 144 F.3d at 671 n.1 (concerning shifting burdens on summary judgment). The nonmoving party may not simply rest upon its pleadings to satisfy its burden. *Anderson*, 477 U.S. at 256. Rather, the nonmoving party must "set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant." *Adler*, 144 F.3d at 671. "To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein." *Id.*

Finally, the court notes that summary judgment is not a "disfavored procedural shortcut," rather, it is an important procedure "designed to secure the just, speedy and inexpensive determination of every action." *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

III. FACTS

The facts are largely uncontroverted. Plaintiff does not specifically controvert any of the defendant's facts, but restates them in her own words and adds additional facts in her supplemental memorandum. The court views the facts, as it must, in the light most favorable to the plaintiff. The plaintiff, an African-American woman, began working for General Motors Corp. (GM) at its Leeds plant in Kansas City, Missouri (Leeds) in 1976. In 1978 the plaintiff was promoted to supervisor of janitors, a salaried sixth-level position. Plaintiff was laid off in June 1980, and recalled

in August 1980 as a fourth-level clerk with an 11% reduction from her previous pay.

In September 1982 plaintiff was laid off again. Plaintiff was recalled in March 1983 as a fourth-level clerk. While in this position, plaintiff performed duties of a company car coordinator. Company car coordinator is a sixth-level position at other GM plants, but plaintiff was employed and payed as a fourth-level clerk while performing those duties. While performing those duties, plaintiff was denied a promotion. GM told the plaintiff that her promotion was denied because no employees at Leeds were being promoted since the Leeds plant was being closed. In August 1987 the Leeds plant closed and plaintiff was once again laid off.

In October 1987, plaintiff transferred to a temporary position as a plant security officer at the GM Fairfax plant at Kansas City, Kansas (Fairfax). While plaintiff was working as a plant security officer, GM offered her a permanent fifth-level position as a labor relations clerk at the Fairfax plant. Plaintiff accepted the position, but she was placed as a temporary fourth-level clerk with pay lower than she had been receiving as a fourth-level clerk at Leeds. GM explained the pay reduction by telling plaintiff that Fairfax did not pay fourth-level employees as much as Leeds. In June 1988, after plaintiff had decided to take a permanent position with GM at Flint, Michigan, plaintiff's fourth-level position was made a permanent position, and plaintiff stayed at Fairfax. Approximately a year later, plaintiff was promoted to a fifth-level labor relations clerk.

In December 1991 plaintiff was promoted to a sixth-level labor relations representative position and, within a month, given a raise to $3,360 per month. At the time plaintiff was promoted to labor relations representative, other labor relations representatives at Fairfax received the following monthly salaries: S.B., $3,721; R.W., $3,893; C.H. $3,681.[2] GM eliminated the second shift at Fairfax in April 1992 and plaintiff was placed in a fifth-level clerk position, without any loss in pay. At the same time, C.H. was placed in a fifth-level position from a sixth level position, also without any loss in pay. In December 1993, plaintiff and C.H. were both recalled to sixth-level positions as labor relations representatives. Plaintiff and the three co-workers she asserts are similarly situated received pay raises after May 1994 as follows:

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[2] Plaintiff's memorandum compares pay received in December 1988. (Pl.'s Supp. Mem., at 5, ¶ 22). However, in December 1988 plaintiff was a fourth-level clerk-not a labor relations representative, but was in a sixth-level position, had been a labor relations representative between April 1985 and April 1988, and was recalled as a labor relations representative in December 1993 along with the plaintiff. (Pl.'s Supp. Mem., Ex. A, D).

Individual	1993 Pay	1994 Pay	% Increase	1995 Pay	% Increase	1996 Pay	% Increase	1997 Pay	% Increase	1998 Pay (Tendered)	% Increase
Plaintiff	$3360	$3528	5.0	$3762	6.6	$3962	5.3	$4082	3.0	$4286	5.0
S.B.	$3896	$4166	6.9	$4356	4.6	$4531	4.0	$4711	4.0	$4921	4.5
R.W.	$4023	$4163	3.5	$4313	3.6	$4513	4.6	$4703	4.2	$4893	4.0
C.H.	$3681	$3905	6.1	$4169	6.8	$4444	6.6	$4629	4.2	$4859	5.0

At all times relevant to this case, the plaintiff was paid the least of the four labor relations representatives. The relative rank order for the percentage of raise given to each of the four co-workers each year can be summarized as follows:[3]

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[3] Where two employees are given the same percentage raise, the table shows the same rank order for each employee.

Individual	1994 Raise	1995 Raise	1996 Raise	1997 Raise	1998 Raise
Plaintiff	$3360	$3528	5.0	$3762	6.6
S.B.	$3896	$4166	6.9	$4356	4.6
R.W.	$4023	$4163	3.5	$4313	3.6
C.H.	$3681	$3905	6.1	$4169	6.8

On at least two occasions between 1992 and 1997, plaintiff complained to defendant about her compensation. At one point, plaintiff complained to the general supervisor of the labor relations department that her compensation was not commensurate with the "market range" for her position and asked if the amount of her raises could be increased. The supervisor explained that "the pie is only so big," and GM could not increase her raises at that time. In approximately April 1996, plaintiff approached the plant personnel director regarding her compensation. Plaintiff had heard that a white clerk at the plant was receiving a salary higher than hers. The personnel director told the plaintiff that her compensation was, in fact, higher than the white clerk's. Plaintiff also expressed concern to the personnel director that her salary was below "market range." The personnel director explained that "the market is going in a different direction" and "the objective is to keep pay scales below market range."

GM employees are prohibited from discussing compensation levels with other employees, but in March 1998 plaintiff discovered a December 1997 salary report which contained a list of the 1997 salaries of all employees in the personnel department, including the plaintiff and the three co-workers plaintiff alleges are similarly situated. From that report plaintiff determined that she was the lowest paid labor relations representative at Fairfax. Plaintiff discussed the report and her level of compensation with the plant's salaried personnel administrator, the plant personnel director, the general supervisor of the labor relations department, and her direct supervisor.

In June 1998, GM tendered plaintiff a five percent raise, to $4286, when it made annual raises, but the plaintiff refused to sign a confidentiality/compensation statement. As a result, plaintiff was not given the raise. Since then, plaintiff has refused to sign any confidentiality/compensation statement and has received no raises. Shortly after the regular June 1998 raise, the Fairfax plant manager and plant personnel director offered the plaintiff an additional raise to $4,600 per month. In August 1998 plaintiff refused the raise because it did not address past disparities in her compensation and would still result in her being paid $259 less per month than the lowest paid of her co-workers. In June 1999 GM tendered a raise to $4,900 per month, and once again plaintiff refused to sign the confidentiality/compensation statement.

Plaintiff's direct supervisor testified that the plaintiff is a very capable person who does her job well and performs equivalently to her co-workers. (Pl.'s Supp. Mem., Limon Depos., p.12, 1.10 - p.13, 1.1; p.22, 1.5 - p.23,1.10). The plaintiff believes that the disparity between her compensation and that of her co-workers is the fault of the former salaried personnel administrator, the former plant personnel director, and the former general supervisor of the labor relations department. However, plaintiff does not recall any specific discriminatory acts or statements by any of the three individuals. (Pl.'s Supp. Mem., at 12, ¶ 48).

IV. STATUTE OF LIMITATIONS

A. Limitations Period

Plaintiff complains pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2,[4] that the defendant discriminated against her by (1) paying her less than similarly situated white co-workers and (2) forcing her to accept pay decreases when she was recalled from lay-off in 1980 at Leeds and again, after the Leeds plant closed, when she was re-hired at Fairfax in 1987 or 1988. The court concludes that the plaintiff may also assert (3) claims of discriminatory annual raises after 1993.[5]

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[4] Plaintiff initially asserted claims pursuant to 42 U.S.C. § 1981 in addition to her Title VII claims. In her papers, the plaintiff has addressed only her Title VII claims and, accordingly, the court deems plaintiff's § 1981 claims abandoned and grants defendant's motion for summary judgment with respect to the § 1981 claims. *Wesley v. Don Stein Buick, Inc.*, 42 F. Supp. 2d 1192, 1995, n.2 (D. Kan. 1999) (claims deemed abandoned where pro se plaintiff failed to address claims in papers responding to summary judgment motion).

[5] Although the plaintiff specifically asserts a claim only for discriminatory salary level, she claims that GM was "paying her less than" other workers (First Am. Compl., at 4, 6) and "denying her raises which would put her in line with corporate policy." (Pretrial Order, at 3). Courts have recognized a claim for discriminatory raises where a claim for discriminatory salary is not cognizable. *Amro v. Boeing Co.*, 65 F. Supp. 2d 1170, 1185-86 (D. Kan. 1999). The defendant has argued that the raises given plaintiff support its position.

Because Kansas is a deferral state, an employee asserting a Title VII claim must file a charge with the EEOC within 300 days after the allegedly discriminatory act occurred. 42 U.S.C. § 2000e; *Mascheroni v. Board of Regents*, 28 F.3d 1554, 1557 n.3 (10th Cir. 1994; *Tilmon v. Dillard's Dep't Stores*, 58 F. Supp. 2d 1276, 1281 (D. Kan. 1999). An administrative complaint is a prerequisite to suit pursuant to Title VII. *Delmar v. Raytheon Aircraft Corp.*, No. 96-1002-JTM, 1996 WL 499144, at *4 (D. Kan. Aug. 9, 1996). Plaintiff filed a charge of discrimination with the EEOC on September 22, 1998. Therefore, any acts occurring before November 26, 1997 are outside the Title VII limitations period and may not be considered by this court unless some reason appears to toll the limitations period.

B. Continuing Violation Doctrine.

Acts occurring before the Title VII statutory period may be considered by the court if they are sufficiently related to at least one allegedly discriminatory act occurring within the period and if all the acts constitute a continuing pattern of discrimination. *Bullington v. United Air Lines, Inc.*, 186 F.3d 1301, 1310 (10th Cir. 1999). The Tenth Circuit has described the relationship:

(Mem. for Summ. J. at 17-18; Reply Mem. at 3). The defendant has acknowledged the issue and will not be surprised or prejudiced if the court recognizes a discriminatory raise claim. Therefore, the court concludes that the plaintiff may assert such a claim.

> The continuing violation doctrine allows a Title VIII plaintiff to challenge conduct that occurred outside the statutory time period if such conduct was "sufficiently related and thereby constitute[d] a continuing pattern of discrimination." "Mere continuity of employment, without more, is insufficient...." Although the act occurring within the statutory period need not violate Title VII when viewed alone, the plaintiff **cannot merely allege the continuing effects of prior acts**; rather, she must show that events inside and outside the statutory period share commonality and are related acts of discrimination. In determining whether a plaintiff has made such a showing, we consider: "(i) subject matter--whether the violations constitute the same type of discrimination; (ii) frequency; and (iii) permanence--whether the nature of the violations should trigger an employee's awareness of the need to assert her rights and whether the consequences of the act would continue even in the absence of a continuing intent to discriminate."

Robbins v. Jefferson County Sch. Dist., 186 F.3d 1253, 1257-58 (10th Cir. 1999) (citations omitted) (emphasis added).

The premise of the continuing violation doctrine is the equitable notion that a statute of limitations should not begin to run until a reasonable person would, or should, be aware that her rights were violated. Therefore, a continuing violation is not likely to be found where a plaintiff knew, or should have known through the exercise

of reasonable diligence, that she was being discriminated against. *Bullington*, 186 F.3d at 1311; *Holmes v. Regents of the Univ. of Colo.*, No. 98-1172, 1999 WL 285826, at *4 (10th Cir. May 7, 1999).

There are five circumstances upon which the plaintiff bases her claim of race discrimination. (1) Pay reductions--upon recall from lay-off in August 1980 and upon hiring at Fairfax in 1987 or 1988; (2) "undercompensation" and failure to promote upon recall from lay-off in March 1983 at Leeds; (3) grade level upon hiring at Fairfax in 1987 or 1988; (4) aggregate pay level below other labor relations representatives upon promotion as a labor relations representative in 1991 or 1992 and continuing for all periods relevant to this suit; and (5) pay raises given or tendered from 1994 through 1998. The court will first analyze plaintiff's claim of a continuing violation based upon the circumstances that did not continue in identical form after November 1997.

1. Discriminatory Acts Not Continuing After November 1997

The court finds no continuing violation based upon the totality of the circumstances. The "acts" which continued into the limitations period are (a) aggregate pay below the level of other labor relations representatives after November 1997, and (b) the raise tendered in June 1998. The fact that all of the alleged discriminatory acts occurring within and outside the limitations period concern compensation is not sufficient to constitute the same subject matter. The pay reductions in 1980 and 1987 or 1988 are not the same subject matter as the acts occurring within the limitations

period. The acts occurring in the limitations period do not involve circumstances in which the work force was reduced or the plant was closed, they deal with decisions on apportioning raises to employees, not with deciding which employees to return from a reduction in force or to hire from a nearby closed plant.

Furthermore, the pay reductions are not acts which occurred frequently beginning in 1980 and continuing into the limitations period. Two pay reductions occurring seven years apart (and where the last one occurred ten years before any charge was filed) are too distant in time to be viewed as frequent occurrences. Finally, the pay reductions were "permanent" for Title VII purposes when they occurred. The consequences of the pay reductions would continue even if the defendant had no continuing intent to discriminate. Further, a reasonable person would know that the time to act was immediately after her pay was reduced. The pay reductions at issue are not part of a course of conduct which continued into the limitations period.

The "undercompensation" and failure to promote at Leeds after March 1983 cannot be considered part of a continuing course of conduct to pay the plaintiff less than similarly situated co-workers. The subject matter of the discriminatory pay at Leeds was to pay the plaintiff at a rate for a **position lower** than the duties she actually performed (a fourth level employee performing job duties normally performed by a sixth-level company car coordinator). Plaintiff does not allege that she was paid less than other fourth-level co-workers at Leeds. At Fairfax, the plaintiff is paid less than **co-workers of the same grade** and job title working in the same office.

Although plaintiff alleges that her underpayment has continued to the present, the underpayment cannot be considered frequent because there is no evidence that GM has made frequent, conscious, intentional decision to underpay the plaintiff. At most, plaintiff can argue that a decision to under pay the plaintiff was made annually when GM considered raises.

Plaintiff does not present any facts to indicate that GM considered her salary in relation to the salary of her co-workers in order to determine her raise.[6] The facts indicate that aggregate salary is used to determine how the employee's compensation compares to the market range for that position (Pl.'s Supp. Mem. at 5-6, 10, ¶¶ 26, 41, 42) and as a base salary upon which to apply a percentage raise. Most importantly, any decisions made by the Leeds plant were permanent when the plant closed and the plaintiff was laid off. At that point, the discrimination was complete. A reasonable person would know that any discrimination which occurred at Leeds was complete.

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[6] Plaintiff states that a GM supervisor compares level of compensation between employees in deciding annual raises. (Pl.'s Supp. Mem., Statement of Uncontroverted Facts, at 7, ¶ 30). The testimony to which the plaintiff cites for that fact, in context, indicates only that a supervisor **might** compare compensation levels, and would have **discretion** to do so. The testimony does not indicate that a supervisor does or is expected to compare compensation levels in deciding raises. (Pl.'s Supp. Mem., Marr Depos., p. 73, l. 25 - p. 75, l. 6). Plaintiff cites to no evidence that any supervisor actually compared her compensation to that of her co-workers in deciding what raise to give her.

The decision by GM to hire plaintiff as a fourth-level rather than a fifth-level employee and reduce her pay upon hiring at the Fairfax plant is not part of a continuing course of discriminatory conduct to suppress plaintiff's pay. The subject matter of that decision was whether to hire an employee who had previously been a GM employee at another facility, what position or positions were available for which she was qualified, and at what level should she be hired. The decision was a one-time decision made at the latest in June 1988 when plaintiff's position was changed from temporary to permanent. Plaintiff does not allege that GM has frequently decided to offer positions to plaintiff and reduce the level of the position after she has accepted. Once the decision was made, it was permanent. The effects of the decision would continue for all the time plaintiff was employed at Fairfax even if there were no continuing intent to discriminate by any of the company decision-makers. At the point at which the position level was reduced and pay was decreased, a reasonable person would have known that it was necessary to assert her rights.

The court finds no basis to apply the continuing violation doctrine to consider the earlier acts of discrimination. The court will next consider the continuing violation doctrine in light of circumstances which existed before November 1997 and continued into the limitations period.

2. "Identical" Discriminatory Acts Occurring Before and After November 1997

Plaintiff argues that GM discriminated against her on account of her race when it gave her a salary below that of her co-workers in January 1992 after it had promoted her as a sixth-level labor relations representative. Plaintiff argues there is a continuing violation because, after November 1997, GM once again discriminated against her on account of her race by making the decision to continue to pay her at a salary below that of her co-workers. Alternatively, the plaintiff claims that she has been given discriminatory raises each year beginning in 1994, that the raise tendered and refused in June 1998 was a discriminatory raise, and that, therefore, GM has engaged in a continuing pattern of discriminatory conduct justifying the court in considering the prior acts of discrimination.

The court assumes for summary judgment purposes that GM's salary decision in January 1992 was unlawful discrimination. Nevertheless, the mere fact that plaintiff's salary remains below that of her co-workers does not constitute a continuing violation. As discussed above, plaintiff provides no evidence that GM ever compared the aggregate level of her salary to that of her co-workers. This case illustrates the wisdom of considering the "permanence" factor before the court may apply the continuing violation doctrine. Based upon the facts presented and assumed by the court, the consequences of GM's discriminatory decision to start plaintiff at a lower salary will continue throughout her career at GM even if no further discrimination or intent to discriminate continues.

Plaintiff knew of her salary in January 1992 immediately after she received the promotion. Although plaintiff's suspicion that race was a factor in setting her salary was not aroused until later, the discrimination was complete. GM is not required to notify plaintiff that it discriminated against her before the statute begins to run. *Tilmon*, 58 F. Supp. 2d at 1283 ("[a] declaration of discrimination need not be issued before the statute of limitations begins to run.") (quoting *Hulsey v. Kmart, Inc.*, 43 F.3d 555, 558 (10th Cir. 1994)). Notice of the adverse employment action is all that is required. Plaintiff argues that GM's policy prohibiting employees from discussing salary prohibited her from knowing that discrimination had occurred. That argument may provide the basis for equitable tolling of the statute of limitations and will be considered later in this opinion.

Plaintiff has shown no actual, frequent, decisions to pay her less than her co-workers. Furthermore, the adverse employment action was permanent in January 1992. A salary below plaintiff's co-workers is no basis to justify application of the continuing violation doctrine. Plaintiff appears to argue that a difference in salary levels during the limitations period is actionable as race discrimination under Title VII so long as the defendant did not take action to correct the disparity, even though the decision to provide plaintiff a lower salary was made outside the limitations period.

Plaintiff's argument is precluded by Tenth Circuit law on continuing violation. The continuing effects of prior acts of discrimination are not actionable. *Robbins*, 186 F.3d at 1257-58; *Holmes*, 1999 WL 285826, at *4. As

discussed above, the discriminatory decision to pay plaintiff a salary lower than her co-workers was permanent and complete in January 1992. A court in this district has previously considered and rejected the argument that a claim for discriminatory aggregate salary disparity may be brought at any time. *Amro v. Boeing Co.*, 65 F. Supp. 2d 1170, 1184-85 (D. Kan. 1999) (citing *Dasgupta v. Univ. of Wis. Bd. of Regents*, 121 F.3d 1138 (7th Cir. 1997)). In *Dasgupta*, the court concluded that aggregate salary based upon decisions made outside the limitations period was not actionable because it was merely the lingering effect of previous unlawful acts. *Dasgupta*, 121 F.3d at 1140. The court in *Amro* agreed, but determined that annual raises are actionable under Title VII. *Amro*, 65 F.Supp. 2d at 1185-86. Accordingly, the court concludes that the disparity between plaintiff's aggregate salary and that of her co-workers is merely the lingering effect of prior discrimination.

Finally, plaintiff's claim that the annual pay raises constitute a continuing course of discriminatory conduct will not justify application of the continuing violation doctrine. Each pay raise constitutes the same subject matter. However, plaintiff does not present evidence to show that her aggregate salary level was ever compared to that of her co-workers in determining her raises.

In the circumstances of this case, frequency is not determinative of a continuing violation. The potentially discriminatory raises occurred at regular intervals in June of each year, and might in the proper circumstances support an inference of a continuing violation. *Compare Roberts v. Gadsden Mem'l Hosp.*, 835 F.2d 793, 801 (11th Cir. 1988)

(two identical incidents, although three years apart, may constitute a continuing violation).

Each year GM gave the plaintiff a raise about which the plaintiff knew all of the facts immediately. If the raise was an adverse employment action which constituted discrimination because of the plaintiff's race, the discrimination was complete and the plaintiff was on notice of the need to assert her rights. As discussed above, the defendant is not required to notify the plaintiff that discrimination has occurred before the limitations period may run. Viewing each raise individually, the consequences of the discriminatory act would continue even in the absence of a continuing intent to discriminate. *Robbins*, 186 F.3d at 1258. Plaintiff may not wait beyond the limitations period to see if the defendant will discriminate again and invoke the continuing violation doctrine to seek redress for violations which occurred outside the limitations period.

The court finds that the continuing violation doctrine is not applicable in the circumstances of this case. However, plaintiff argues in the alternative that her "cause of action did not accrue until 1998 when she discovered that she was discriminated against due to pay." (Pl.'s Supp. Mem., at 21).

C. EQUITABLE TOLLING.

Plaintiff argues that the limitations period should be equitably tolled because GM's compensation confidentiality agreements prevented her from discovering the adverse employment action. Plaintiff reasons that she was unaware that her compensation was below that of her co-workers,

that she was without notice of any adverse employment action until she discovered the salary report in March 1998 and that, therefore, the limitations period should be equitably tolled.

The Tenth Circuit has determined that a Title VII "time limit will be tolled only upon a showing of active deception where, for example, the plaintiff has been actively misled or lulled into inaction by her past employer, state or federal agencies, or the courts." *Simons v. Southwest Petro-Chem, Inc.*, 28 F.3d 1029, 1031 (10th Cir. 1994) (citations and internal quotation marks omitted); *compare Gray v. Phillips Petroleum Co.*, 858 F.2d 610, 616 (10th Cir. 1988) (tolling permitted only if plaintiff is actively misled or prevented from asserting her rights in some extraordinary way). To justify equitable tolling, the plaintiff must show that her failure to timely file was the result of "either a deliberate design by the employer or actions that the employer should unmistakably have understood would cause the employee to delay filing [her] charge." *Hulsey*, 43 F.3d at 557 (internal quotation marks omitted).

The circumstances of this case do not rise to the level of active deception required for equitable tolling. Plaintiff presents no evidence that GM's policy was part of a deliberate design to hide discrimination until after the limitations period. Many companies have a policy that employees may not discuss compensation and that the company will not reveal salaries. Those policies minimize conflict and promote harmony in the workplace. Plaintiff fails to present evidence that GM should have understood its policy would cause plaintiff to delay filing her EEOC charge.

Furthermore, plaintiff's statement of facts indicates that she suspected her salary was below market range for her position and was even below that of a **white clerk** as early as April 1996. (Pl.'s Supp. Mem., at 10, ¶¶ 41, 42). As the court previously noted, the defendant is not required to notify the plaintiff that it has discriminated against her before the limitations period will run. Even assuming the defendant's explanations for the plaintiff's salary and the policy on discussions about compensation were intended to mislead the plaintiff into inaction, the plaintiff suspected race discrimination was the reason for her low salary and knew that GM denied any problem in 1996, at least two years before she filed a charge with the EEOC. *See Purrington v. Univ. of Utah*, 996 F.2d 1025, 1030-31 (10th Cir. 1993) (equitable tolling is not applicable where plaintiff knowingly failed to act with due diligence and knew employer had not adequately addressed the issue).

Finding no continuing violation and no equitable tolling of the limitations period, this court has no basis to consider any allegations of discriminatory conduct occurring before November 26, 1997. The plaintiff, however, claims that the raise tendered in June 1998 was based upon race discrimination. Because the raise was tendered within the limitations period, the court must consider whether summary judgement for the defendant is proper on that claim.

V. RACE DISCRIMINATION IN 1998 PAY RAISE

A. Legal Standard Controlling Race Discrimination Claims

Title VII prohibits an employer from discriminating against an employee because of the employee's race. 42 U.S.C. § 2000e-2(b). In order to prevail on a race discrimination claim, the plaintiff must show that the defendant had a discriminatory intent or motive in its decisions concerning the plaintiff. *EEOC v. Flasher Co.*, 986 F.2d 1312, 1317 (10th Cir. 1992); *Wright v. Wanydotte County Sheriff's Dep't*, 963 F. Supp. 1029, 1035 (D. Kan. 1997). Plaintiff need not show that race was the sole motivation for the defendant's decisions, but only needs to establish that race was a factor which made a difference in the decision. *Elmore v. Capstan, Inc.*, 58 F.3d 525, 530 (10th Cir. 1995). Since plaintiff presents no direct evidence of discrimination, the court must analyze the plaintiff's claims under the burden-shifting framework provided in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Elmore*, 58 F.3d at 529; *Flasher*, 986 F.2d at 1317; *Wright*, 963 F. Supp. at 1036.

Under the three-step *McDonnell Douglas* framework, the plaintiff must first establish a prima facie case of discrimination. *Elmore*, 58 F.3d at 529. If plaintiff is able to establish a prima facie case of discrimination, the defendant in step two must articulate a legitimate, nondiscriminatory reason for its decisions. *Id.* at 530. Once the defendant produces evidence of a legitimate, nondiscriminatory reason, then in step three the plaintiff is left to prove that the defendant's decision was the result of

intentional discrimination. *Id.* The plaintiff's burden in step three may be met by showing that the defendant's articulated nondiscriminatory reason is a pretext or cover-up for the real, discriminatory reason, or by direct or circumstantial evidence that the defendant had a discriminatory motive or intent in reaching its decisions. *Id.*

> To establish a prima facie case of race discrimination, plaintiff must show that: (1) she is a member of a racial minority; (2) her job performance was satisfactory; (3) she was adversely affected by defendant's employment decisions; and (4) similarly situated non-minority employees were treated differently.

Wright, 963 F. Supp. at 1036 (citing *Martin v. Nannie & the Newborns, Inc.*, 3 F.3d 1410, 1417 (10th Cir. 1993) and *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1260 (10th Cir. 1988)).[7]

B. ANALYSIS

1. Similarly Situated Employees

For purposes of summary judgment, the defendant has conceded that the plaintiff has satisfied the first three

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[7] Plaintiff asserts that "[t]o make out a prima facie case for racially motivated disparate pay . . . a minority plaintiff need merely to show that she occupies a job 'similar' to that of higher paid non-minorities." (Pl.'s Supp. Mem. at 16). The court already decided that the plaintiff's claim for racially motivated disparate pay is untimely. Therefore, the court need not decide whether plaintiff's assertion is correct.

elements of a prima facie case, but denies that plaintiff can show that she is similarly situated to the three co-workers she cites as comparable.[8] The court must determine whether the plaintiff has established that similarly situated employees were treated differently with regard to the June 1998 raise tendered by defendant. Employees are similarly situated if they deal with the same supervisor and are subject to the same performance evaluation and discipline standards. *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1404 (10th Cir. 1997). The court, in deciding whether employees are similarly situated, should consider **relevant** employment circumstances such as company policies applicable to the employees and whether their work history is comparable. *Id.*

Defendant argues that the plaintiff is not similarly situated to her co-workers because none of the co-workers has ever worked at Leeds, all of them have been in sixth-level positions longer than plaintiff, and none of them has ever been laid-off and forced to look for a position when a plant closed. If the plaintiff were able to assert her claim of discriminatory salary level, such considerations would certainly be relevant. However, the only claim properly before the court is plaintiff's claim of discriminatory pay raise in June 1998. Therefore, such considerations are **not relevant**. None of those considerations relate to criteria used by GM in determining raises--performance, critical

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[8] The court notes that the defendant's concession was directed toward claims of disparity in salary level and reduction in pay in 1980 and 1987 or 1988. The concession was not directed toward a claim of discriminatory raises.

skills, and position to mid-point. (Pl.'s Supp. Mem., at 5-6, ¶ 26).

Plaintiff and her co-workers all worked for the same supervisor in 1997 and 1998 and they were subject to the same standards for performance evaluation and the same company policies. There is evidence that the plaintiff and her co-workers performed their duties approximately equivalently. Therefore, the court finds that the co-workers chosen by the plaintiff as comparables were similarly situated to plaintiff for purposes of the 1998 raise at issue. However, that does not end the inquiry. The plaintiff must show that the similarly situated employees were treated differently than she in some discriminatory fashion.

Plaintiff has not met her burden under Title VII to show that, in the June 1998 pay raise, she was treated differently because of her race. In 1998, R.W. and S.B. each received a smaller percentage raise than plaintiff, and C.H. received exactly the same percentage raise as the plaintiff. No similarly situated non-minority employee was treated better than the plaintiff. Although S.B. and C.H. received a greater raise in terms of dollars per month ($210 and $230, respectively, versus $204 for the plaintiff), that is merely a continuing effect of the fact that the plaintiff's aggregate salary was less than her co-workers before the raise was given. The court finds as a matter of law that the plaintiff cannot establish a prima facie case of disparate treatment based upon the June 1998 pay raise tendered by the defendant and refused by the plaintiff.

The court finds that the plaintiff's Title VII claims based upon actions or decisions before November 26, 1997

are barred by the statute of limitations and may not be considered by this court. Furthermore, plaintiff has failed to establish a prima facie case of race discrimination pursuant to Title VII with respect to any actions or decisions within the limitations period. Therefore, summary judgment is proper with respect to all claims asserted by the plaintiff.

VI. ORDER

IT IS THEREFORE ORDERED that plaintiff's motion to supplement (Doc. 39) is granted.

IT IS FURTHER ORDERED that defendant's motion for summary judgment (Doc.28) is granted in its entirety. All of plaintiff's claims are dismissed with prejudice.

Dated this /28/ day of December 2000, at Kansas City, Kansas.

/s/ Carlos Murguia
UNITED STATES DISTRICT JUDGE